RECORD AND BRIEFS

Supreme Court, U.S.
MOTION FILED
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No. 16-712

IN THE
SUPREME COURT OF THE UNITED STATES

OIL STATES ENERGY SERVICES, LLC,
Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF FOR *AMICUS CURIAE* HOUSTON INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

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September 19, 2017

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

The Houston Intellectual Property Law Association ("HIPLA") respectfully moves for leave to file the accompanying brief out of time as *amicus curiae* in support of neither party. The parties have filed letters with the Court granting blanket consent to the filing of amicus briefs.

HIPLA is an association of hundreds of lawyers and other professionals who predominately work in the Houston, Texas, area (*see generally* www.hipla.org). The practice of most of the HIPLA membership relates in substantial part to the field of intellectual property law. Many of HIPLA's members regularly practice before the Patent and Trademark Office (PTO), including in *inter partes* review proceedings and other administrative proceedings created under the America Invents Act (AIA). This case has the potential to undo one of the two most significant parts of the AIA, itself the most sweeping change to the nation's patent laws in the last 65 years. HIPLA and its members thus have a substantial interest in the outcome of this case.

On June 12, 2017, the Court granted the petition for a writ of certiorari in this case. On July 13, 2017, the Court extended the time to file petitioner's brief on the merits to August 24, 2017. Pursuant to this Court's Rule 37.3(a), amicus briefs in support of neither party are due seven days after

the petitioner's brief is filed. With a due date of August 31, 2017, counsel for HIPLA expected to file its amicus brief on time, and had taken necessary steps to ensure a timely filing.

Before drafting was complete, Hurricane Harvey, an extremely destructive Atlantic hurricane, made landfall on the Texas Gulf Coast resulting in record flooding in many parts of the Houston Metropolitan Area. Counsel for HIPLA responsible for primary drafting of the brief was among the many tens of thousands of unfortunate residents in the region whose homes were flooded during the week beginning Sunday, August 27, 2017. Counsel was forced to evacuate his residence resulting in the brief being significantly delayed.

HIPLA believes this amicus brief will assist the Court in deciding this very important case involving U.S. patent law. Rather than addressing the constitutionality of the PTO's *inter partes* review proceeding, HIPLA respectfully wishes to draw the Court's attention to the potential impact of its decision on other administrative proceedings by which issued patent claims may be cancelled, and the extent of the public's reliance on the present statutory scheme under which patents can be cancelled by an executive agency.

In view of the extraordinary circumstances causing the delay and the importance of the issue to be addressed in this case, HIPLA respectfully requests that the Court grant this motion and accept the following brief out of time.

Respectfully submitted,

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QUESTION PRESENTED

Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

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INTEREST OF *AMICUS CURIAE*

The Houston Intellectual Property Law Association ("HIPLA") is an association of hundreds of lawyers and other professionals who predominately work in the Houston, Texas, area (*see generally* www.hipla.org). The practice of most of the HIPLA membership relates in substantial part to the field of intellectual property law. Founded in 1961, HIPLA is one of the largest associations of intellectual property practitioners in the United States.[1] HIPLA represents the interests of its members and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. As an organization, HIPLA has no stake in the outcome of this litigation.[2] But, because of the possible consequences of the Court's decision, HIPLA provides this brief to ensure the Court is informed of the historical and present-day context for this

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[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Further, no organization or person other than HIPLA or its counsel made such a monetary contribution. The parties have filed letters with the Court granting blanket consent to the filing of amicus briefs.

[2] HIPLA's Amicus Committee and Board of Directors voted on the preparation and submission of this brief. HIPLA procedures require approval of positions in briefs by a majority of directors present and voting.

case, including the existence of other administrative proceedings that share relevant characteristics with *inter partes* reviews.

SUMMARY OF ARGUMENT

While the question presented in this case is whether Congress had authority to create the particular proceedings at issue—*inter partes* review—it could implicate *any* administrative avenue for cancelling issued patents. Beginning with the Patent Act of 1952, Congress has acted on the assumption that it has this authority, creating several administrative avenues for correcting or cancelling patents at the request of third parties.

Because these proceedings did not exist prior to the 1952 Act, the Court's opinions during that period do not directly address the question in this case. Nevertheless, during that period the Court twice addressed questions regarding the proper role of the executive and judicial branches in administering the patent system. If the Court now resolves that Congress allocated more power to the executive than the Constitution allows, its decision could upset the expectations of a public that has come to rely on administrative adjudication of intellectual property rights in the United States.

ARGUMENT

I. The Question Presented—the Limits of Congressional Power to Decide Who Cancels Issued Patents—Does Not Turn on Any Feature Unique to *Inter Partes* Review Proceedings

Before addressing the question presented, it is worth noting a related question that is *not* presented, but which the Court may need to resolve at a later date. The Court has not been asked to pass on whether the regulations and practices governing the Board or its proceedings infringe the Fifth Amendment due process rights of patent owners engaged in *inter partes* reviews.

This distinction is important precisely because of the potential for a subsequent Fifth Amendment challenge. The manner in which *inter partes* reviews are conducted has been the subject of criticism by both practitioners and jurists. *See, e.g.*, *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, No. 2016-2321, 2017 WL 3597455, at *5 (Fed. Cir. Aug. 22, 2017) (Dyk, J.) (expressing concerns as to certain PTO procedures); *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1302 (Fed. Cir. 2016) (Reyna, J.) (same); Gene Quinn, *Are PTAB Proceedings Fundamentally Unfair to Patent Owners?*, http://www.ipwatchdog.com/2015/03/06/ptab-proceedings-unfair-to-patent-owners/id=55397

(Sept. 22, 2015); Remarks of Director Michelle K. Lee at Meeting of U.S. Patent & Trademark Office's Patent Public Advisory Committee at 12 (May 4, 2017) *available at* https://www.uspto.gov/sites/default/files/documents/PPAC_Transcript_20170504.pdf ("We've been hearing that these proceedings are a great source of concern to a number of our stakeholders in the patent community."). The PTO itself acknowledges that the public has been critical of *inter partes* review and has solicited feedback on ways to improve it. Amendments to the Rules of Practice for Trials Before the PTAB, 81 Fed. Reg. 18,750, 18,760 (April 1, 2016) (noting multiple rounds of requests for comments on America Invents Act (AIA) trial procedures, and subsequent rulemaking by the agency). Particular criticisms may yet mature into due process challenges in a future case. HIPLA wishes to draw the Court's attention to the potential impact its opinion in this case may have on any such future case.

The question presented here is fundamental but limited: Did Congress usurp power reserved exclusively for the courts or juries under Article III and the Seventh Amendment when it authorized the PTO to cancel issued patents at the conclusion of *inter partes* review proceedings? The particular regulations or practices governing *inter partes* review—whether required by Congress or promulgated by the Director of the PTO—have little if any weight in resolving this question.

It follows that the Court's decision in this case may also affect the legitimacy of other PTO procedures Congress has authorized over the years. As discussed further below, the PTO has been authorized to cancel patents through a number of different avenues. HIPLA submits this brief so that the Court can benefit by understanding both this history and the potential reach of its decision.

II. The PTO's Congressional Authorization to Cancel Patents

Congress first gave the PTO authority to cancel issued patents, under certain prescribed conditions, in the Patent Act of 1952. Since then, the number of avenues by which the PTO may do so has grown.[3]

In this section, HIPLA describes the respective administrative procedures for patent cancellation and the relevant similarities with *inter partes* review. To the extent the Court decides that Congress exceeded its authority by empowering the PTO to cancel patents or claims of patents during *inter partes* review proceedings, the

[3] Some of the administrative vehicles for cancellation were eliminated by the Leahy–Smith America Invents Act (the AIA), but the administrative cases pending as of the effective date of the pertinent AIA sections have continued.

constitutionality of these other proceedings may be implicated, too.

A. Interferences

The first time Congress explicitly granted the Patent Office—the PTO's predecessor agency—the authority to cancel issued patents, it was in the context of interferences. Interference proceedings, in some form, have been a part of the patent system almost since its inception. *See, e.g., U.S. v. Duell*, 172 U.S. 576, 583 (1899) (explaining that, under the patent laws enacted in 1793, priority of interfering applications was decided by a board of arbitrators appointed by the parties and the Secretary of State). And while interferences do not always involve issued patents, Congress expressly provided for interferences between patent applications and "unexpired patent[s]" as far back as 1836. Patent Act of 1836 § 8, Pub. L. No. 24-357, 5 Stat. 117, 120–21 (July 4, 1836).

In the 1952 Patent Act, Congress provided for the first time that "[a] final judgment [in an interference] adverse to a patentee from which no appeal or other review has been or can be taken or had *shall constitute cancellation of the claims involved from the patent*, and notice thereof shall be endorsed on copies of the patent thereafter distributed by the Patent Office." Patent Act of 1952, Pub. L. 593, 66 Stat. 792, 802 (July 19, 1952) (emphasis added). Prior to the enactment of this provision, when an interference resulted in a

judgment that an application had priority over an issued patent, the application would issue as a patent; a party with an interest in one of the two issued patents could then file a bill of equity to resolve the dispute over which party was entitled to a patent. *See* Patent Act of 1836 § 16; *Kappos v. Hyatt*, 566 U.S. 431 (2012); *Duell*, 172 U.S. at 584 (finding the remedy "still existing in sections . . . 4918, Revised Statutes" under the Patent Act of 1870). A bill of equity served the dual purpose of allowing review of the decision to issue the interfering patent and a declaration that one or both of the two patents was void. *See Butterworth v. U.S.*, 112 U.S. 50, 62–63 (1884) (describing Rev. Stat. § 4918 as a check on "erroneously" issued interfering patents that permitted a court to "adjudge and declare either of the patents void in whole or in part, or inoperative or invalid"). Thus, under the pre-1952 regime, both patents remained in force unless one of the interested private parties filed the bill, even though at least one of the two patents "'[was] void for want of novelty.'" *Ewing v. U.S.*, 244 U.S. 1, 11 (1917) (quoting Walker on Patents § 317 (3d ed.)).

At the time, the cancellation provision of the Patent Act of 1952 was seen as possible because the patentee whose rights were being extinguished had full rights to the same appeal remedies an unsuccessful applicant would have. *See* P.J. Federico, *Commentary on the New Patent Act*, Ch. 12 (1954) (noting that the cancellation provision "is made possible by the amplification of the right of

review of the patentee provided for in section 146"); *see id.* at Ch. 13 ("Under the old statute the civil action was restricted to an applicant, and a patentee who lost an interference in the Patent Office was not able thereupon have recourse to this remedy. This has been changed by section 146 which provides that 'Any party to an interference' may have remedy by civil action, and a losing patentee now has the same remedy as a losing applicant."). In the post-1952 regime, appeal from the final decision of the PTO in an interference is and was available to the Court of Appeals[4] under section 141 or to district court under section 146. 35 U.S.C. §§ 141, 146; *see* Patent Act of 1952, 66 Stat. at 802–03 (setting forth original text of sections 141 and 146); AIA § 6(f)(3)(C), Pub. L. 112-29, 125 Stat. 284, 311 (Sept. 16, 2011) (making appeals under amended sections 141 and 146 applicable to legacy interferences).

This scheme, by which the Patent Office or PTO was empowered to cancel issued patents, remained in place until the first-inventor-to-file provisions of the AIA became effective. Even now, some pending interferences remain to resolve priority of applications and patents that are governed by pre-AIA law.

[4] Prior to the establishment of the U.S. Court of Appeals for the Federal Circuit, section 141 appeals were to the U.S. Court of Customs and Patent Appeals.

B. *Ex Parte* Reexamination

Congress created *ex parte* reexamination when it enacted the Bayh–Dole Act in 1980. *See* Act to Amend the Patent & Trademark Laws § 1, Pub. L. 96-517, 94 Stat. 3015, 3015–16 (Dec. 12, 1980). *Ex parte* reexamination, like *inter partes* review, permits the PTO to review an issued patent at the request of someone other than the patent's owner and, when the necessary findings are made and appellate remedies exhausted, cancel the patent. *See generally* 35 U.S.C. § 302 *et seq.* A patent owner may appeal from *ex parte* reexamination only under section 141. *See* 35 U.S.C. §§ 135(b), 141.

Although the procedure for conducting reexamination is drastically different from the one employed in *inter partes* reviews, the salient features are similar. Parties other than the patent owner may request cancellation of a patent, the PTO may grant that request, and the patent owner may appeal to the U.S. Court of Appeals for the Federal Circuit (which is an Article III court) but not to a district court.

C. *Inter Partes* Reexamination

Prior to the effective date of the AIA, Title 35 provided for *inter partes* reexamination. As relevant to this case, *inter partes* reexamination was similar to *ex parte* reexamination, except that the party requesting the reexamination had

additional rights. *See generally* 35 U.S.C.A. § 311 *et seq.* (2010) (permitting third-party requestor to submit papers during reexamination, to appeal, and to participate in appeals by the patent owner). The AIA replaced the *inter partes* reexamination provisions with those authorizing *inter partes* review. *See* AIA § 6(a), 125 Stat. at 299–304.

D. Derivation Proceedings

Under the first-inventor-to-file regime established by the AIA, interferences were replaced by derivation proceedings. AIA § 3(i), 125 Stat. at 289. Derivation proceedings are subject to many of the same rules as *inter partes* review. *See* 37 C.F.R. §§ 42.100, 42.400 (providing that both types of proceedings are governed by subpart A of C.F.R. Part 42). And, like *inter partes* reviews, a final decision in a derivation proceeding that is "adverse to claims in a patent" results in cancellation of those claims, absent appeal. 35 U.S.C. § 135(d); *see* 35 U.S.C. § 318(b) (requiring cancellation of claims found unpatentable in an IPR after completion of an appeal, if any). Unlike *inter partes* reviews, appeal from a derivation proceeding may be had either to the U.S. Court of Appeals for the Federal Circuit or to district court. 35 U.S.C. §§ 141, 146.

E. Post-Grant Review & Covered Business Method Patent Review

The AIA also created post-grant reviews and the related transitional program for covered business

method patents, which uses almost the same set of rules as post-grant reviews. *See* 35 U.S.C. § 321 *et seq.* (establishing post-grant review); AIA § 18, 125 Stat. at 329–31 (establishing covered business method patent review as a species of post-grant review); 37 C.F.R. §§ 42.200(a), 42.300(a) (subjecting both programs to many of the same regulations).

These programs are similar to *inter partes* review in all relevant ways. They are initiated by the Board based on a petition filed by someone other than the patent owner. 35 U.S.C. §§ 311, 314, 321, 324. The Board rules on patentability of the claims, subject to review on appeal by the U.S. Court of Appeals for the Federal Circuit. *Id.* §§ 318(a), 319, 328(a), 329. And the PTO cancels claims found unpatentable after the conclusion of an appeal, if any. *Id.* §§ 318(b), 328(b).

III. This Court's Pre-1952 Act Precedent

Prior to 1952, Congress had not acted to give the Patent Office authority to cancel issued patents. As explained in section II.A above, the Patent Act of 1952 empowered the PTO, for the first time, to cancel an issued patent (or the interfering claims of the patent). Before that enactment, cancellation of claims in an interfering patent required filing a suit in equity.

Accordingly, the Court's statements in *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898), that "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent" and the like could be read as descriptions of the extant statutory regime. At that time, the Patent Office did not have statutory authority to cancel an issued patent. *Cf. id.* (recognizing that the power to issue a patent for an invention "comes from Congress"). The Court did not consider the power of Congress or the scope of Article III, however, because such questions were beyond the scope of the matter before the Court at that time. *See id.* at 608 ("The validity of the claims in question depends upon the view taken of the action of the examiner in rejecting them when incorporated in an application for a reissue of the patent," after the patentee "abandoned the application for a reissue and requested and obtained from the Patent Office the return of the original patent."). *McCormick* therefore does not resolve the question presented in this case.

While the Court did not have the opportunity to confront the constitutionality of similar congressional action until after the Patent Act of 1952 was enacted, other of its pre-1952 decisions might be useful in resolving this case. In particular, in *United States v. Duell* and *Butterworth v. United States*, the Court was called upon to referee the

jurisdictional boundary between the executive and judicial branches in patent-related matters as it is in this case.

The issue in *Butterworth* was whether the Secretary of the Interior had the right to review and correct decisions of the Commissioner of Patents, which right the Secretary claimed was implied by his right to supervise and direct his subordinate officer.[5] *Butterworth*, 112 U.S. at 55; *see id.* at 63 ("If it [an appeal to the Secretary] exists, it is admitted it is only by an implication . . .."). The Court began with the Constitutional text, "which confers upon Congress the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'" *Id.* at 58 (quoting U.S. Const. Art. I, § 8, cl. 8). The Court then considered the nature of patent rights as implicating both public and private interests, the quasi-judicial nature of the acts statutorily assigned to the Commissioner, and the role of courts in the patent system before concluding that "the fact that no appeal is expressly given to the Secretary is conclusive that none is to be implied." *Id.* at 64; *see id.* at 59–64.

[5] The Secretary of the Interior and the Commissioner of Patents relied on the opinion of the Attorney General of the United States in reaching their interpretation. *See id.* at 53.

In *Duell*, the Court rejected arguments that Article III courts lack jurisdiction to review the action of the Commissioner of Patents in an interference. *See Duell*, 172 U.S. at 582 (describing petitioner's argument), 589 (rejecting the jurisdictional challenge). The Court viewed its earlier decision in *Butterworth* as being "directly in point" and "applicable" to the arguments in *Duell*. *Id.* at 586. Seeing no reason to deviate from the reasoning in *Butterworth*, the Court affirmed the Court of Appeals' exercise of jurisdiction. *Id.* at 588–89.

Again, neither of these cases resolves the constitutional question here because neither *Duell* nor *Butterworth* addressed post-issuance cancellation proceedings. Nevertheless, the Court's decisions in these cases, which both implicate the separation of powers, *see Duell*, 172 U.S. at 589 (finding "no encroachment of one [branch of government] on the domain of another as to justify us in holding the act in question unconstitutional"); *Butterworth*, 112 U.S. at 67 ("[T]o whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially."), may provide some guidance in the present case.

IV. Public Reliance on the Present Statutory Regime

Since 1952, Congress has acted on the assumption that issued patents are part of a federal regulatory scheme under which patents can be cancelled by an executive agency, and, rightly or wrongly, the public has come to rely on that understanding. As explained above, Congress expanded the ways in which the PTO could exercise its quasi-judicial functions to review and potentially cancel issued patents in several Acts over the last 65 years. The public has taken advantage of these avenues for administrative review in thousands of cases. *See* USPTO, Trial Statistics IPR, PGR, CBM (August 2017) (7,429 petitions filed from AIA's effective date to August 31, 2017, including 6,831 *inter partes* review petitions) *available at* https://www.uspto.gov/sites/default/files/documents/trial_statistics_2017_08_31.pdf; USPTO, *Ex Parte* Reexamination Filing Data (Sept. 30, 2016) (13,450 requests for *ex parte* reexamination filed from July 1, 1981 until end of FY 2016, including 9,520 requests filed by members of the public other than the owners of the subject patents) *available at* https://www.uspto.gov/sites/default/files/documents/ex_parte_historical_stats_roll_up.pdf; USPTO, Inter Partes Reexamination Filing Data (Sept. 30, 2016) (1,919 requests for *inter partes* reexamination filed from November 29, 1999 until AIA's effective date) *available at* https://www.uspto.gov/sites/default/files/documents/inter_parte_historical_stats_roll_up.pdf.

If the characteristic of patents as property is sufficient to preclude this manner of legislation, it could eliminate avenues for reviewing issued patents that have been used by the public for decades. In addition, there may be ramifications for other intellectual property rights, which are subject to other statutory schemes. For example, Congress has created specialized tribunals that routinely adjudicate other non-patent intellectual property, such as the Trademark Trial and Appeal Board and the Copyright Royalty Board. To the extent the rights adjudicated by these tribunals are analogous, the ruling in this case may inform future decisions regarding the constitutionality of those proceedings as well.

CONCLUSION

This case presents a question that, while important, is quite narrow: whether certain patent cancellation proceedings must be conducted before an Article III court and/or a jury. Congress has historically acted on the assumption that they need not be because patents implicate public, as well as private, rights and created several administrative proceedings by which issued patents may be cancelled against the wishes of the patent owner. HIPLA respectfully wishes to draw the Court's attention to the potential impact of its opinion on such proceedings.

Respectfully submitted,

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